No. 15863

United States Court of Appeals
For the Ninth Circuit

POPE & TALBOT, INC., a corporation, *Appellant*,

vs.

JACK V. CORDRAY, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLEE

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By PHILIP J. POTH
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STATEMENT OF JURISDICTION

A judgment on a jury's verdict was entered against the appellant on November 18, 1957, in the District Court for the Western District of Washington, Northern Division (R. 34). The cause giving rise to the judgment was tried before the Honorable John T. Bowen, sitting with a jury on the civil side of the court.

The appellee alleged that he was injured aboard appellant's vessel while it was in navigable waters (R. 8, 9). Diversity of citizenship was both alleged and admitted (R. 7, 17).

After consideration of the grounds asserted for a new trial, or judgment notwithstanding the verdict, the court made its order denying the same on the 13th day of December, 1957 (R. 38). This appeal has followed.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is conferred by the provisions of Title 28, U.S.C.A. §1332.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28, U.S.C.A., §1291, which gives to the Courts of Appeal jurisdiction of all appeals from final judgments of District Courts.

STATEMENT OF THE CASE

The facts relating to liability in this cause are uncomplicated. They are as follows:

1. The Appellee Was Injured Aboard Appellant's Vessel While It Was in Navigable Waters

The record shows that the appellee was aboard appellant's vessel, the P & T ADVENTURER, on the morning of July 15, 1956, while the ship was moored in navigable waters alongside Pier 48 in the Port of Seattle, Washington (R. 53, 54). This was also admitted by the appellant (R.17, 18).

2. The Appellee Was a Foreman of Longshoremen Engaged in Handling the Vessel's Cargo

The appellant's vessel, the P & T ADVENTURER was moored at said Pier 48, for the purpose of discharging the vessel's cargo. Appellant's contract of carriage concerning the cargo required that it raise the cargo out of the hold and stow it in the warehouse (R. 355, 356, 357). Aside from contract responsibility the necessity of utilizing longshoremen to carry the ship's cargo to a place

of stowage in the warehouse is shown by the testimony of appellant's supercargo and own witness (R. 339).

> "Q. Well, now, is it necessary to carry that cargo away and stow it in the dock, or can you just leave it at the ship's side?
>
> A. Oh, no, you can't, you've got to take it away from the ship's side. You wouldn't have any place to put it.
>
> Q. And you have to take it in and stow it in the warehouse, isn't that correct?
>
> A. That's right."

The ship's cargo on the vessel on which appellee was injured was in a continuous process of movement from the hold of the vessel to a place of rest in the warehouse (R. 185, 186). Mr. Cordray was a foreman of longshoremen whose duties were as follows (R. 292):

> "Q. And what were your duties there that night?
>
> A. My duties were to see that the cargo was moving from the ship to the dock or from the dock to the ship, see that the cars were under the gear so the gear wouldn't be hanging at any time."

His employer described appellee's duties at the time of his injury (R. 180):

> "A. Well, he is a supervisory employee who directs the work of the longshoremen on the terminal in the physical movement of the cargo."

Two stevedoring companies were employed in the cargo operation. The longshoremen on the ship were employed by the Seattle Stevedoring Company (R. 128) and the longshoremen on the dock were employed by Olympic Steamship Company (R. 184, 185). The appellee was a foreman of the dock longshoremen (R. 52).

Each had a contract with appellant for the handling of the ship's cargo in order that the appellant could fulfill its contract of freightment with shippers, with respect to the vessel's cargo.

An excellent summary of the evidence in this respect is contained in the admissions in open court made by appellant (R. 350):

> "THE COURT: Now wait just right there. What is your contention on that point? Do you agree up to this point about what the contractors and each of them agreed to do? Is that in accord with your understanding of this situation?
>
> "MR. HOWARD: Well, your Honor, I agree that the admitted fact is that the Seattle Stevedoring Company had a contract with Pope & Talbot to load and discharge cargo from the vessel. I also agree that Pope & Talbot had arranged with Olympic Steamship Company as a public terminal operator to handle the cargo on the dock.
>
> "THE COURT: The public terminal operator?
>
> MR. HOWARD: As a public terminal operator.
>
> "THE COURT: Then I do not see how—whose invitation or contract started whichever one of these stevedores, contracting stevedores, to work on the dock and on the ship? Whose word was it that started one working on the ship and the other one working on the dock?
>
> "MR. HOWARD: Pope & Talbot, your Honor.
>
> "MR. POTH: Pope & Talbot, your Honor.
>
> "THE COURT: Pope & Talbot in both instances put out the word that put the two stevedoring concerns to work, is that right? (426)
>
> "MR. HOWARD: I don't think there is any dispute about that in the evidence.

"THE COURT: And you do not seek to show it was for any other purpose, it was for the purpose of discharging the steamship carrier's obligation to carry and deliver cargo to the consignee that these two things were done?

"MR. HOWARD: Yes. We haven't had testimony on that, but I expect this witness will give that testimony. (427) * * * "

Further clarification is also contained in the following admissions of the appellant (R. 325, 326):

"THE COURT: In that connection do you argue or do you contend that this Court must find as a matter of law that on the evidence in the case up to now it was a part of the shipping contract to put this cargo at the places where plaintiff and his crew were engaged in putting it at the time of the accident and that that obligation on this carrier was a part of the carriage contract? Do you make any contention like that?

"MR. HOWARD: We have made no contention to that effect, your Honor. However, we don't deny that it is part of the obligation of the steamship company as carrier to not only raise the cargo out of the hold and land it on the dock, but also to place it in the warehouse.

"THE COURT: Where these men foremanned by the plaintiff were putting it or engaged in putting it at the time of the accident?

"MR. HOWARD: That's right, yes, your Honor.

"THE COURT: I believe that will have to determine the Court's ruling upon this motion. (373)"

The foregoing clearly shows that the appellee was a vital cog in the unloading of appellant's vessel. All of his duties related to the direct flow of the ship's cargo to

its place of stowage upon the pier. At all times he was performing an essential service to the vessel in the handling of its cargo. Without his efforts and the labor of the longshoremen under his supervision, the vessel's unloading could not have been accomplished, or its contract of carriage fulfilled.

3. The Appellee at the Time of His Injury Was in a Place Aboard the Vessel Where It Was Necessary for Him to Be in Connection with His Cargo Handling Duties

It was necessary for the appellee, in the performance of his duties towards the discharge of the vessel's cargo, to alternate his movements between the ship and the pier (R. 52, 53).

The work of discharging the cargo had to be coordinated between the longshoremen working aboard the ship, and the longshoremen working on the pier. The latter are also classified as longshoremen (R. 219, 246).

The deposition, taken at the instance of the appellant, of Melvin M. Stewart, manager of the Olympic Steamship Company, plainly describes the necessity of appellee's alternation between the ship and dock in connection with the handling of the ship's cargo (R. 191).

> "Q. Now, I believe you mentioned a part of his job in seeing that cargo was moved to its first place of rest from ship's tackle was the coordination of dock handling with the work aboard ship of handling cargo, is that correct?
>
> A. I don't recall that. That is correct. I don't recall if I made that statement or not.
>
> Q. But that is correct? He has to coordinate the two operations together, is that right?

A. Well, he has to coordinate to have terminal employees and equipment available at the end of ship's tackle to keep the cargo moving.

Q. Now, is it ever necessary to achieve that coordination that a dock foreman go aboard the vessel?

A. Yes, it is.

Q. And I will ask you whether or not it is the custom and practice for a dock foreman to go aboard a vessel to give orders and to make arrangements for this coordination of ship's tackle and dock equipment?

A. Yes, it is a common practice."

The appellee at the time of his injury was aboard the vessel for the sole purpose of coordinating the cargo handling work of the dock-longshoremen with that of the longshoremen working on the ship. Robert L. Peters, the foreman for Seattle Stevedoring Company, testified as follows (R. 54):

"Q. And what conversation did you have with him, if any?

A. Well, he came up and stood alongside of me on the deck right opposite the hatch and he asked me what I was going to do with the gang, so that he would know whether to lay his bull driver off or whether to keep him. A lot of times when we're finishing a ship like that we may cover one hatch and then put a gang into another hatch to load dunnage or ship's gear or whatever might be there to load. The first gang that finishes usually jumps from one hatch to the other to clean up different items that have to be done.

Q. And whereabouts were you and he on the

P & T Adventurer when you had this conversation?

A. We were standing just abreast of number two hatch on the starboard side.

Q. And what then happened, if anything?

A. Well, at that particular time just as he started to question me as to what we were going to do with the gang, we were winging in the gear to get it inside so we could shift the gang to another hatch.

Q. All right, and then what happened?

A. During that conversation while he was asking me what I was going to do with the gang the boom was wung in over the edge of the ship and the block on the tent gantline dropped and hit him on the side of the neck and the head."

Aside from the necessity of alternating between the ship and the dock for the purpose of coordinating the flow of cargo, the record shows that the appellee had been expressly invited aboard the vessel by the appellant's own supercargo (R. 294):

"A. The first time we went aboard the ship I went aboard the ship with the dock supervisor. His name is Mr. Wallace. There was cargo coming out of number four hold or number five, I'm not positive which one, and there were cars—it was stuff going into cars, gondolas. The stuff that was supposed to come out first was in such a position, I guess, that they couldn't get it out first, so the supercargo asked Mr. Wallace and I to come up and look down the hatch and see why they had to have a different car under the dock—under the hook. We had to go up there because we had to shift these other cars to get in the car that was supposed to be for that certain cargo.

Q. Then did you have occasion to go aboard after that?

A. Well, if I'm not mistaken we had went up, Mr. Wallace and I had went up twice with the supercargo. The supercargo had told me before midnight that some of these gangs were going to work till after five o'clock in the morning.

Q. All right. Now, is it a custom and practice to go aboard ships on the part of dock foremen?

A. All the jobs that I've been on I've seen it, it has been a practice." * * *

The appellee, Jack V. Cordray, further testified as to the reasons for his presence aboard the vessel in connection with the handling of its cargo (R. 294, 295, 296):

"Q. (By Mr. Poth): What is the necessity, if any, of a dock foreman going aboard in regard to discharging operations of a ship?

A. Well, there's quite a few of them. Some of them, you go up there, you're bringing out different kind of cargo. You want to find out what they are going to bring out next so that you can have the gear ready on the dock. If they are bringing out general cargo on boards, you have boards under the hook. Maybe they'll say, 'In a little while maybe you're going to get tires.' If they bring out tires they do not bring them out on boards, you have to have a different kind of equipment for your bull driver to haul the tires away, and you get your information there.

Q. What other examples?

A. Well, I've had to go up there and ask the foreman, like that night when I went up I asked him, I said, 'Is this gang going to go home or are they moving to another hatch?' Mr. Peters says,

'Somebody, I don't know who, has changed their mind.'

Q. What time did you go aboard?

A. The last time?

Q. The last time.

A. Well, it was approximately a quarter to five.

Q. I didn't quite catch that.

A. Approximately a quarter to five.

Q. And what was your purpose in going aboard?

A. The reason I went up, I went up on the gangplank, I seen Mr. Peters standing by number two. I went up to ask Mr. Peters if this gang was going to go home or shift to another hatch, and I had to have that information so I could let the drivers on the dock go or keep them.

Q. Now, as far as that gang aboard the ship was concerned, if you had let your bull drivers go without consulting Mr. Peters would the ship gangs have been able to continue work?

A. No.

Q. Why?

A. Because you have to have the drivers to give them the cargo or the dunnage or whatever they need.''

4. The Cause of Appellee's Injury Was the Unseaworthiness of the Vessel's Gantline Block and Pennant

Evidence in the record shows that the wire strap, securing the block which fell upon appellee, was completely rusted through (R. 62, 66, 130, 131, 198, 199).

The block was hanging free before it fell. There was no strain upon it. The sole cause of its falling being the unseaworthy condition of the wire strap suspending it (R. 58, 59, 136, 137, 139).

QUESTION PRESENTED

Does a Longshoreman Handling Cargo on a Pier, Lose His Status as a Longshoreman When His Cargo Handling Duties Take Him Aboard the Vessel

Appellant has advanced in various ways numerous contentions of error with respect to the liability. However, reduced to their essence, appellant's contentions orbit around the above-stated question. This plainly appears in the Summary of Argument set forth at page 15 in appellant's brief.

> A. "A dock foreman (such as appellee) * * * who is injured while temporarily aboard the vessel, is not within the classes of persons entitled to recover * * * on the basis of unseaworthiness."
>
> B. "A dock foreman * * * is not an *invitee* but only a licensee while briefly aboard the vessel * * *."

ARGUMENT

The Scope of the Doctrine of Seaworthiness as Expressed by the Supreme Court Clearly Embraces the Longshoreman on the Pier Engaged in Loading or Unloading the Ship

An analysis of the contentions of appellant presents the anomalous situation, whereby the appellee could recover if he was standing on the pier when struck by the ship's block, but negates recovery because his longshore duties took him aboard the vessel.

Such a position is not tenable as a matter of law, or consonant with the practical mechanics of loading and unloading a vessel. It has been said many times that the work of loading and unloading a vessel was historically done by the crew. As a practical matter, how could any

ship have been loaded or unloaded if part of her crew did not work ashore handling the cargo? The hands of the crew were of necessity the motive agency in the flow of cargo between the ship and its place of stowage on the pier.

It has now been firmly established in the law that workmen engaged on a pier in handling cargo in direct transit to and from a ship are longshoremen entitled to the vessel's warranty of seaworthiness. A leading case in point is the *Strika* case. The District Court in *Strika v. Holland America Line, et al.,* 90 F.Supp. 534, said as follows:

> "The scope of the doctrine of seaworthiness as expressed by the Supreme Court clearly embraces the longshoreman on the pier engaged in loading or unloading the ship, for, as the Supreme Court stated: 'Historically the work of the loading and unloading is the work of the ship's service, performed until recent times by members of the crew. That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection. Not the owner's consent to liability, but his consent to performance of the service defines its boundary.' *Sieracki* case, 328 U.S. 96, 66 S.Ct. 878, 90 L.ed. 1099."

The court below was upheld on appeal in *Strika v. Netherlands Ministry of Traffic* (2 Cir.) 185 F.2d 555, certiorari denied, 341 U.S. 904, 95 L.ed. 1343, 71 S.Ct. 614. The appellate court also held that a longshoreman injured ashore by unseaworthiness of ship's gear has an action for indemnity against the ship owner.

The *Strika* case has also been cited by the Supreme

Court in a footnote to its decision in *Alaska Steamship Co. v. J. O. Peterson,* 347 U.S. 396, 74 S.Ct. 601, 98 L.ed. 798:

> "See *Strika v. Netherlands Ministry of Traffic* (2 Cir.) 185 F.2d 555, allowing recovery from a shipowner for an injury suffered by a longshoreman while on shore, but caused by the ship's unseaworthy tackle."

A discussion of the *Strika* case is contained in Harvard Law Review, Vol. 64, p. 996 (1950-51):

> "Maritime Law has traditionally given the seaman the right of indemnity from the shipowner for injuries caused by the ship's unseaworthiness. See *The Osceola,* 189 U.S. 158, 175 (1903). In *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), this right was extended to a longshoreman injured aboard ship, though employed by a stevedore contractor hired by the shipowner, the court reasoning that since the risks arise out of work in the service of the ship, the right had its origin in the 'status' of the person performing that work rather than any contractual relationship of employment. Consequently longshoremen performing what in the past had been seamen's work were held entitled to the right of indemnity from the owner for unseaworthiness, though not directly employed by him. *Cf., International Stevedoring Co. v. Haverty,* 272 U.S. 50 (1926). There would seem to be no rational basis for granting this remedy only where the injuries occurred aboard ship, and the instant case quite logically extends it to the longshoremen engaged in loading the ship though working on the dock."

Another case directly in point is *Valerio, et al., v. American President Lines, Ltd., et al.,* 112 F.Supp. 202:

> "Valerio and Russo became infected while working on the dock. Valerio handled not only the drums but also the hooks which, whether supplied by the ship or contractor, constituted a part of the ship's discharging equipment which the ship was required to maintain seaworthy and the oil on which rendered the ship unseaworthy. Both were engaged in unloading cargo under a contract between the shipowner and the employer of the libellants which expressly provided for the sorting and stacking of the cargo man high on the pier upon the discharge of the vessel, and for tiering above man high upon the discharge at extra cost. Both were engaged in the maritime service of unloading the ship and were injured by contact with cargo known to be hazardout and requiring special precaution. See *Strika v. Netherlands Ministry of Traffic* (2 Cir., 1950) 185 F.2d 555, 64 Harvard L. Rev. 996, 46 U.S.C.A. §740, and accordingly the shipowner is also liable to them."

The appellant has objected to the court's use of the term (R. 44) "foreman of the dock-working longshoremen" (appellant's brief, page 11). Appellant submits that the appellee should have been designated as "a shoreside or dock worker" (appellant's brief, page 21), or one of the "shoreside-dock workmen" (appellant's brief, page 24).

The foregoing authorities classify the appellee as a longshoreman. There is no question in the Record in respect to this nomenclature. The undisputed evidence gives him such a status as a matter of law. The appellant produced no evidence to contradict either the duties or the calling of the appellee. However, a play on names is not important to the issues in this cause. Sole impor-

tance belongs to the nature of the work of the appellee and of those employed under him. The record is clear that at all times the appellee was performing a direct service to the ship in the handling of its cargo. He was not performing work for a shipper or a consignee. He was doing work for which the ship was solely responsible—which was the discharging of cargo to a place of stowage on a pier. This was plainly longshore work as it is everywhere known. The ship was therefore obliged to furnish him the guarantees due a cargo handler, whether he be called a longshoreman, laborer, or commodity moving specialist. The court was therefore justified in giving the stock instruction on seaworthiness.

The Supreme Court in *Pope & Talbot v. Hawn* (1954) 346 U.S. 406, 98 L.ed. 143, said as follows:

> "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subject to the same danger. All were entitled to like treatment under the law."

A Longshoreman Aboard a Vessel in the Performance of His Duties in the Unloading of Its Cargo Is Not a Mere Licensee or Trespasser

The appellant further contends that the appellee was

at best a mere licensee when he was injured aboard the vessel. In support of this position appellant makes two assumptions (appellant's brief, page 21).

> "He had no work to perform aboard the vessel which was of any benefit to appellant shipowner, and he happened to be aboard only to obtain information to aid him in conducting his shoreside duties."

All of the testimony is to the contrary in respect to appellant's assertion that appellee had no duties aboard the ship that were of benefit to the shipowner. Appellant produced no evidence on this subject. As previously shown in appellee's statement of the case, appellee was obliged to alternate between the ship and the dock in order to coordinate the ship and dock cargo handling. It is so obvious that appellee's work of keeping the cargo moving, was of prime benefit to the shipowner, that it scarcely deserves comment.

The second assumption to the effect that appellee was aboard the ship in aid of conducting his shoreside duties is correct. But appellant's inference drawn therefrom is incorrect. Overlooked by appellant is the fact that appellee's shoreside duties concerned the direct handling of the ship's cargo to its place of rest upon the pier, which was work in the ship's service. Also overlooked is the fact that the shipowner had contracted with appellee's employer to fulfill the appellant's obligation of stowing the cargo on the dock. Again it scarcely deserves comment that these "shoreside duties" were actually the ship's duties.

Contrary to contentions contained in appellant's brief, the court below gave the appellant an extremely

favorable position in instructing the jury on appellee's presence aboard the vessel (R. 404).

> "In order for the plaintiff to recover, you must in any event find from a preponderance of the evidence that the plaintiff was at the time of the accident in a place aboard the vessel where it was reasonably necessary for him to be in the performance of his duties as foreman of the dock-working longshoremen assisting on the dock in the discharge of the vessel's cargo.
>
> "If you do not so find, plaintiff would be in a status similar to that of a person without any employment connection with the unloading work at hand, and in that event plaintiff would not be entitled to recover in this case."

The appellant cites no authorities but contends that the court made an unwarranted finding of fact when it told the jury the following (R. 437):

> "The employees of each of such contractors in their work had the right to go upon such places under defendant's control as were reasonably necessary in the performance by such contractors' employees of their work of discharging said cargo from vessel hold to point of rest on the floor within the dock warehouse."

This statement of the court is based upon undisputed evidence. The appellant offered no testimony to contradict it. The rule in respect to such a statement by the trial judge is well settled. It has long been held that an instruction is not objectionable for assuming an uncontroverted fact, or one which is admitted or conclusively proved. In *Tuttle v. Detroit, G. H. & M. Ry. Co.,* 7 S.Ct. 1166, 122 U.S. 189, 30 L.ed. 1114, it was said:

> "In making this statement the judge was fully

borne out by the testimony and there was no evidence to contradict it."

Another case in point is *Terminal R. Ass'n. of St. Louis v. Fitzjohn,* 165 F.2d 473:

> "The difficulty with defendant's position is that there was no substantial dispute about the facts and the court in applying the law to those facts could permit of no other conclusion than that plaintiff was an employee of the defendant. It is not necessary under those circumstances to submit to a jury issues of fact about which there is no real dispute. *Federal Savings & Loan Ins. Corp. v. Kearney Trust Co.* (8 Cir.), 151 F.2d 720; *United States Coal Co. v. Pinkerton* (6 Cir.) 169 Fed. 536; *Toledo St. S. & W. R. Co. v. Kountz* (6 Cir.) 168 Fed. 832."

However, the trial judge did not remove any issue of fact from the jury's consideration as contended by appellant the court properly instructed the jury as follows (R. 416):

> "While it would be proper for me as the trial judge to analyze the testimony and to give you my understanding of it, which, however, would not be binding upon you, my purpose is not to intimate to you any opinion I may have of any fact or the weight of any evidence, and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating to the jury any opinion I may have of the facts, but simply to illustrate some proposition of law which is involved with the facts."

It has likewise been long settled that a trial judge in the Federal Courts may comment on the evidence. Here the trial judge expressly advised the jury in the above instruction that they were not to be bound in their de-

liberations by any statement of fact that he had made. They were further told that they were the sole and exclusive judges of the evidence (R. 413, 414). The rule in this respect has been stated in *Vicksburg & M. R. Co. v. Putnam,* 7 S.Ct. 1, 118 U.S. 545, 30 L.ed. 257:

> "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment on the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

The rule has also been stated in *Meadows v. United States,* 144 F.2d 751:

> "The rule in the federal courts is different from that in the North Carolina courts and we have repeatedly held that as long as the judge tells the jury that they are the sole judges of the facts, under the evidence, as the judge here did, he may comment in a proper way, upon the facts and the evidence. *Lovejoy v. United States,* 128 U.S. 171, 9 S.Ct. 57, 33 L.ed. 389."

In support of its contention that appellee was at best a mere licensee as a matter of law, appellant cites numerous cases. All of these cases, without exception, concern persons, who in the words of *Berryhill v. Pacific Far East Line,* 238 F.2d 713, "had nothing to do with the loading or unloading the ship." No case of a cargo handling longshoreman or his foreman is cited.

Examples of cases cited by appellant are as follows:

The Germania, 10 Fed. Cases 225, No. 5360:

> "This was a libel *in personam* brought by several insurance companies to recover amounts paid by them respectively on policies of insurance on damaged wheat."

The Washington (Supr. Ct. Cal., 1930) 292 Pac. 120, 1930 A.M.C. 1849:

> "Joseph D. Teehan, a civil service employee of the City of Oakland, sustained injuries to his head and spine when he fell on the steamer Washington * * *. While he was required to check all property arriving on or leaving the wharf, he took no part in the actual loading or unloading of vessels and exercised no contract over persons engaged for that purpose."

Lee v. Pure Oil Co. (C.A. 6, 1955) 218 F.2d 711:

Here a bakery truck driver fell on somebody else's barge while attempting to go to a ship moored on the other side of the barge.

> "Indeed he was performing no service at all to the barge alleged to be unseaworthy, but to the 'Charles W. Snider' even assuming that a provisioner performs a ship's service."

Swanson v. Luckenbach S. S. Co. (C.A. 9, 1927) 17 F.2d 735, 736.

This case concerned the employee of a shipper.

> "He was not employed by, and rendered no service to, the defendant, nor did he have anything to do with the stowing of the cargo * * *."

The Sudbury (D. Ore., 1926) 14 F.2d 533-34:

> "He was on the vessel for the purpose of ascer-

taining facts, if he could, that would form the basis of a claim against the boat or the stevedoring company."

The Second Circuit case of *Guerrini v. U. S.* (C.A. 2, 1948) 167 F.2d 352, involving a ship cleaner, quoted by appellant in its brief, is now of purely academic interest. It has been overruled by the Second Circuit in *Halecki v. United N. Y. & N. J. S. H. P. Ass'n.* (C.A. 2, 1958) 251 F.2d 708.

> "It is now clear we were wrong both in limiting the warranty to those doing longshoreman's work and in supposing the surrender of 'control' of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot v. Hawn, supra,* 346 U.S. 406, 74 S.Ct. 202, 98 L.ed. 143. * * * Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot v. Hawn, supra.*

The Simplicity of the Cause Required No Special Form of Verdict

This cause did not differ from a host of other maritime causes tried to a jury on the issues of negligence and seaworthiness. Appellee knows of no rule requiring maritime causes of action to be submitted to a jury by way of special interrogatories. The appellee agrees with the appellant when it states in its brief, pages 42 and 43, that special interrogatories are to be considered as a matter within the "sound discretion" of the trial judge, but appellee disagrees with appellant's interpretation of this Court's decision in *United Pacific Railroad Co. v. Bridal Veil Lumber Co.* (C.A. 9, 1955) 219

F.2d 825, 831. Appellant interprets this decision as holding that special interrogatories are important and necessary in a negligence case (Appellant's Brief, page 43). Actually the court said this form of verdict has "pit falls."

> "It is true that Rule 49(a) of the Federal Rules of Civil Procedure 28 U.S.C.A. has eliminated many of the inherent dangers of special verdicts consisting solely of answers to interrogatories unaccompanied by a general verdict * * *. But to say 49(a) has improved the usability of the special verdict is not to say the special verdict no longer has pitfalls."

The Amount of the Award of Damages Is Supported by the Evidence

The appellee was struck on the head and neck by a heavy gantline block and wire strap (R. 54). He was immediately hospitalized for two days. However, he became worse and was rehospitalized from the 28th of August until the 15th of September (R. 297, 298). He continually suffered from pain and terrific headaches (R. 298, 302).

> "A. I have pain continuously in the right side of my neck. If I work steady on these rough docks and the rough holds of the ships I get these tremendous headaches and stiff necks. On many jobs I've had to quit because I can't stand it, and I'm not putting in today the hours I should be putting in."

He has never been free of pain since the injury (R. 307). The nerves of his fingers are affected (R. 306). Because of his injuries he has had to give up various

forms of recreation, including the managing of Little League baseball and football teams (R. 307). He has continually lost work on account of the injury (R. 302). His injury has prevented him from working steady (R. 307, 308).

The attending physician related the long course of treatment he has given the appellee (R. 151, 152, 153, 154, 155). He described the pain and suffering that the appellee has been enduring and stated that in his opinion appellee's troubles were caused by the accident aboard appellant's vessel (R. 156). He further found damage to the disk between the vertebrae at about the level of the seventh cervical vertebrae (R. 157, 158). He testified that the effects of the injury are substantially permanent (R. 162). He further stated that by reason of the injury appellee is unable to do the full-time work of a longshoreman (R. 169, 170), and finally it was testified by this attending physician and surgeon that the appellee may require surgical treatment to attempt to relieve pinching or the pressure on the nerves (R. 159).

The degree of injury and the amount of the damages were considered both by the jury and the trial judge that had the opportunity of personally seeing the appellee and hearing his testimony, and the testimony of other witnesses.

The appellant, in its brief, asks this Court to reduce the damages as a condition for not requiring a new trial (Appellant's Brief, page 42). However, the rule is that the result should be left to turn upon the good sense and

deliberate judgment of the judge and jury assigned by the law to ascertain what is just compensation for the injuries inflicted. This rule was announced in the *City of Panama,* 101 U.S. 453, 464, 25 L.ed. 1061:

> "When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

There is no fixed standard to measure compensation for pain and suffering. This likewise is a matter that should be left to the trial judge and jury who heard and saw the injured party. This Court said in *United States v. Luehr,* 208 F.2d 138 (9th Cir.):

> "Such computations necessarily involves a high degree of speculation, but there are aspects of the situation on which one need not speculate. The court judicially knows that the value of the dollar continues to decline and that wages, including the wages of longshoremen, steadily pursue their ascending spiral. * * * We know of no standard by which to measure compensation for pain and suffering. On the whole we are not persuaded that the trial court's award is excessive."

In *Pacific Greyhound Lines v. Rumeh* (C.A. 9, 1949) 178 F.2d 652, this court also said

> "damages for pain and suffering are peculiarly within the discretion of the jury."

In *Southern Pacific Co. v. Guthrie* (C.A. 9, 1951) 186

F.2d 926, this court said, in referring to the review of the amount of an award,

> "But this power and duty belongs exclusively to the trial judge."

CONCLUSION

Appellee respectfully submits that the verdict of the jury was based upon substantial evidence, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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